UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	
		Docket #18cv790
SINCLAIR,	:	1:18-cv-00790-KMW-BCM
Plaintiff,	:	
- against -	:	
ZIFF DAVIS, LLC, MASHABLE,	:	
		New York, New York
Defendant.	:	December 1, 2020
----------	:	TELEPHONE CONFERENCE

PROCEEDINGS BEFORE
THE HONORABLE BARBARA C. MOSES,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For Plaintiff:
THE DUNCAN FIRM
BY: JAMES BARTOLOMEI, ESQ.
50 West 90th Street, 5A
New York, New York 10024

HOBEN LAW
BY: BRYAN HOBEN, ESQ.
112 Main Street, 1st Floor
Peekskill, New York 10566

For Defendant - Mashable Inc.:
COWAN, DEBAETS, ABRAHAMS & SHEPPHARD LLP
BY: NANCY WOLFF, ESQ.
LINDSEY EDELSTEIN, ESQ.
41 Madison Avenue, 38th Floor
New York, New York 10010

Transcription Service: Carole Ludwig, *Transcription Services*
155 East Fourth Street #3C
New York, New York 10009
Phone: (212) 420-0771
Email: Transcription420@aol.com

Proceedings recorded by electronic sound recording;
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APPEARANCES (CONTINUED):

For Defendant - Facebook:

KIRKLAND & ELLIS LLP
BY: DALE CENDALI, ESQ.
JOHANNA SCHMITT, ESQ.
ARI LIPSITZ, ESQ.
601 Lexington Avenue
New York, New York 10022

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THE CLERK: Good morning, this is case number 18cv790, Stephanie Sinclair versus Mashable Inc. Counsel, please state your appearances for the record and please spell your names, beginning with the plaintiff.

MR. JAMES BARTOLOMEI: Good morning, this is James Bartolomei, B-A-R-T-O-L-O-M-E-I, I'm with the Duncan Firm, and I represent plaintiff, Stephanie Sinclair.

THE COURT: Good morning.

MR. BRYAN HOBEN: Hi, this is plaintiff's attorney, Bryan Hoben, H-O-B-E-N, with the firm Hoben Law, I represent the plaintiff, Stephanie Sinclair.

THE COURT: Good morning. And that's it for plaintiffs, correct?

MR. HOBEN: Yes, correct.

THE COURT: All right, who's on for Mashable?

MS. NANCY WOLFF: Yes, good morning, Your Honor, this is Nancy Wolff, W-O-L-F-F, at Cowan, DeBaets, Abrahams & Sheppard, and I'm with my colleague, Lindsey Edelstein, E-D-E-L-S-T-E-I-N. I think I got that right.

THE COURT: And good morning. And for Facebook, please?

MS. DALE CENDALI: Good morning, Your Honor,

this is Dale Cendali, D-A-L-E C-E-N-D-A-L-I, of the law firm Kirkland & Ellis, along with my colleagues, Johanna Schmitt, J-O-H-A-N-N-A, Schmitt, S-C-H-M-I-T-T, and Ari Lipsitz, A-R-I L-I-P-S-I-T-Z. We are counsel for third party, Facebook, in this matter.

THE COURT: Thank you very much and thank you for rejoining us.

MS. CENDALI: Thank you, Your Honor.

THE COURT: We only have the one motion before us today and that is Facebook's motion for a protective order with respect to the 30(B)(6) (indiscernible). I'm not terribly optimistic because you would have told me this if it were true, but is there any chance that the parties have had any further discussions and agreed to any compromise, whatsoever?

MS. CENDALI: Well as it happens, Your Honor, this is Ms. Cendali, we have, though not on the material issues. On Friday night around 8 p.m., plaintiff's counsel sent us a proposal to, I think it was intended to try to narrow the deposition topics. So we had another meet and confer yesterday with plaintiff's counsel to discuss it. And will recount a few issues have been eliminated or clarified, so that's great, but we are still at an impasse at some

of the core basic issues. So sadly we will have to have this conference today, Your Honor.

THE COURT: All right, well, Ms. Cendali, why don't you tell me what, in your view, has been narrowed or agreed upon and then I'll let plaintiff tell me if they view that any differently.

MS. CENDALI: Well I think that it might be easier, because some things are more in terms of, of, how do I put this, in terms of some clarity on some of the topics, I think it would be more efficient to go through it issue by issue and we can explain where things are now in, with regard to each one.

I can tell you definitively though, and counsel, I'm sure, will correct me if I'm wrong, the topic 1.K which seeks testimonies about Instagram's dispute resolution procedures, plaintiffs agreed yesterday to strike that topic as duplicative of topic 1.B. So that one at least is moot. Other things are more nuanced than that.

THE COURT: If you think it would be more sensible to just go through it starting with 1.A, that's fine, I'll follow along.

MS. CENDALI: Okay. Well I think that if you permit me, Your Honor, we were trying to simplify this

and what we ended up doing obviously, all with Your Honor's permission, is to group things in three buckets. Because I think that it's easier to understand it by category. Because otherwise if we go through it topic by topic, there will be a lot of duplication. And the three buckets are topics, the first bucket is topics that we think in the subpoena are overbroad and should be narrowed, the second bucket are topics we think are not relevant at all and should be stricken entirely, and then the third bucket is just relating to the catchall document request at the end.

And in terms of going through the buckets, I think it's important because this informs all, Facebook's entire position with regard to this and what's relevant and relates to all the different topics, and that's the scope of Facebook's involvement in this case and the scope of what the relevant issue is.

As we understand it from Judge Wood's opinion, the issue in this case with regards to Facebook is whether Instagram's terms of use and platform policy granted a sublicense to defendant, Mashable, to embed the Sinclair photograph in question in March of 2016.

THE COURT: Well, yes and no. It's not clear to me from Judge Wood's second opinion whether the question is Sinclair specific or more generic. And I'm not sure that Judge -- I'm not sure that Judge Wood knew the answer to that either. The parties may. Is the question here a generic one, i.e. would the answer apply to anyone in Ms. Sinclair's position at the time that the Sinclair photograph was embedded on the Mashable website through to the time when it was taken down? Or is there an actual question here about whether some human being did something specifically relating to Sinclair that could have created a sublicense, it was not just a result of the same algorithm didn't apply to everybody on Insta. (indiscernible) question?

MS. CENDALI: I think, Your Honor, I see your point but I think the, it's not that mysterious in that Facebook has already gone on record, as the parties have talked about in the June *Ars Technica* article. And as we explained to plaintiff's counsel yesterday, plaintiff's terms of use and platform policy that were in effect as of March of 2016 do not a sublicense. Facebook is free to, under its policies as Judge Wood noted, to grant such sublicenses, but

they did not do that. And they did not do that for anybody and the anybody would, of course, then include Mashable in this situation.

THE COURT: So just to pull the lens out for a moment here and understand where all the moving pieces are, I understand that these issues have broad significance beyond Ms. Sinclair and Mashable, but I also understand that this case is about Ms. Sinclair and Mashable. And what's relevant here has to be limited to what's relevant to Ms. Sinclair's claims against Mashable. But if I understand what you're telling me on behalf of Facebook, you're telling me that essentially that there was no sublicense here, or at least not one that was created by virtue of the Instagram API or terms of use. And, therefore, not only does Ms. Sinclair have a viable copyright claim against Mashable because, at least as alleged in the complaint, Mashable requested and did not obtain from her an individual license, that this is going to turn out to be true for every photographer whose photographs were embedded via the Instagram API and somebody else's website and who didn't individually negotiate a license, right?

MS. CENDALI: Well that would be the case in

terms of, I mean again, that's, none of that is really our business but just to be clear from principles of copyright is that that doesn't mean that any of these individuals necessarily have a good copyright case, just to be clear --

THE COURT: There are lots of reasons that they might not. They might not own a valid copyright. They might have granted a license or someone might have granted a sublicense through some other mechanism, sure, all kinds of things.

MS. CENDALI: There could be fair use, there could be all sorts of things. But from the point of view, to the extent that someone is their only defense, let's put it that way is that way, is that Facebook, in their mind, granted a sublicense to them. Facebook is willing to give testimony and reiterate what it said in the *Ars Technica* article that it did not.

THE COURT: Which is why the *Ars Technica* article uses terms like, you know, throwing under the bus and so forth. I don't expect you to necessarily agree with that characterization but it's because of the breadth of the implication, right?

MS. CENDALI: Right. Well people, we can't

control what reporters choose to right and how people choose to interpret it. We can only give truthful testimony as to what we have done and what our policies state.

THE COURT: So your view is, I'm sorry, I'm trying to speed things up a little bit here.

MS. CENDALI: Sure.

THE COURT: Your view is, yes, plaintiff, you're right, there was no sublicense from Instagram to Mashable through the Instagram API. And, therefore, if Mashable doesn't have some other defense, plaintiff is going to end up prevailing in this lawsuit. And you want to get in and out of the a 30(B)(6) deposition as sufficiently as possible.

MS. CENDALI: Yes, except for the part about we're agnostic as to the situation between the particular parties in issue in this case. We really don't know what all the back and forth between the two of them has been or what the nature of their different disputes and arguments, whether anyone is (indiscernible). So we're not opining as to which side wins, all we're saying is that from the point of view of Facebook we did not grant that sublicense and we want to try to remove that issue. And you're

absolutely right, Your Honor, we would like to get in and out as quickly as possible so that as a nonparty we're not overly burdened for reasons, as Your Honor noted yourself in the (indiscernible) *v. MetLife* case.

THE COURT: Well the reason why I keep pushing on this point a little bit is usually when the expected testimony of a nonparty is going to be helpful to one side or the other, the plaintiff, the fight is generally not between the plaintiff and the third party over the scope of the deposition, they're generally agreeing with each other. And yet here, even though your third party testimony is expected to be very favorable to the plaintiff, it's the plaintiff who is fighting with you, why is that?

MS. CENDALI: I don't know, Your Honor, but from our position, they should not be fighting with us so much because we're giving them really what they need. And you know, as I'm happy to go into, but they also want, you know, in our view, you know, to burden us with unnecessary testimony beyond that. And we think that that's not reasonable in light of the narrow issues in this case with respect to Facebook.

THE COURT: Let's go through the buckets.

MS. CENDALI: Okay, thank you, Your Honor. So

the first bucket, as I said, is that parts of the subpoena are overbroad and should be narrowed. And the subpoena has eight topics that all relate to Instagram's terms of use and platform policy. And Facebook's agreed, we've already discussed, to have a witness give testimony on the terms of use and platform policy that were in effect as of March of 2016, and whether they granted a sublicense.

Facebook is also willing to go broader than that, as we've stated in our objections and in our submission to the Court, but to also give testimony on pertinent and relevant, I'm quoting the language of plaintiff in paragraph 35 of her second amended complaint, which are namely terms concerning user content restrictions, content removal obligations, limitations on the use of the Instagram API, compliance with the rights of third parties and the license to use the Instagram APIs. We're willing to do that, too, but they want to go beyond --

THE COURT: Hold on. Hold on. Hold on. So your view is with respect to the terms of use in the platform policy, you want to limit to March, 2016, notwithstanding that the photo remained up and embedded until some date I don't remember in 2018, as

those terms of use and platform policy relate either to granting a sublicense or to the specific provisions alleged in paragraph 35 of the operative complaint.

MS. CENDALI: That's correct. And the areas of disagreement are, I think there are three.

THE COURT: All right.

MS. CENDALI: The first is plaintiff seeks testimony from Facebook whether plaintiff was bound by the terms of use and whether it granted a license to Instagram. But this isn't a disputed issue, as Judge Wood held in her initial opinion at page 4, plaintiff concedes that she's bound by the terms of use and that users grant Instagram a nonexclusive, fully paid and royalty free transferable license. So we don't know why that's even an issue and why we need to give testimony about it.

THE COURT: Now as to that issue, the plaintiff to Instagram link in the potential licensing here, which of the subtopics of the subpoena call for that?

MS. CENDALI: We believe that's 1.A an 1.G.

THE COURT: Right.

MS. CENDALI: So I could --

THE COURT: (indiscernible) its application to

Instagram's users, that's very broad, that could conceivably go both ways.

MS. CENDALI: Right. And a lot of this language is very broad and so what we're trying to do is use more specific words here to talk about what we're willing to do which is give testimony with regard to the, whether we granted the sublicense and with regard to the items identified in their own paragraph 25 of the complaint. But not, to the extent that topics 1.A and 1.G relate, ask for testimony on whether plaintiff was bound and the scope of the license from plaintiff to Instagram, those are not issues in this case anymore as Judge Wood had held.

THE COURT: I understand your argument. Stay with me for a minute though on the temporal limitation because this is going to keep coming up.

MS. CENDALI: Yes.

THE COURT: You want to limit everything to March (indiscernible) happened, plaintiff points out, and this does seem to have some facial appeal, that the infringement, if there was an infringement, was ongoing until Mashable took the post down in 2018. So why shouldn't that be (indiscernible)?

MS. CENDALI: There's to aspects to this, Your

Honor. The first is that they have agreed to narrow some of the topics but I don't think it's helpful to kind of go through that because I think that the same temporal limitation makes sense for all of them. But they have asked us to go from December of 2012, long before the post, up till through at least January '18, 2018, when things were taken down.

What happened, whatever was in the case before March of 2016 is plainly irrelevant and should not, we shouldn't have to prepare a witness on that. With regard to afterwards and the matter of copyright law, I appreciate Your Honor's point that, well, it was still up, but the embed, the conduct in issue took place as of March of 2016. That's the actionable conduct. The fact that it remained there as a result of that conduct doesn't change from a copyright point of view that the relevant action would be judged by that point in time. So we would --

THE COURT: Let me test you on that, okay, it doesn't go to liability, could it go to damages? Let me give you a hypothetical. Suppose that Instagram changed its policy in 2017 and said, you know what, we're going to grant that sublicense. Anyone who wants to or who has already used the Instagram API to

embed a post in their website, here's your sublicense, wouldn't that cut off damages?

MS. CENDALI: I see your point, Your Honor, it could or it theoretically could. I'm not trying to actually litigate this case, as you can appreciate.

THE COURT: Just for relevance purposes, that's our (indiscernible) today.

MS. CENDALI: I hear you. I will, I can say that we're not aware of any changes in the policy post March, 2016, through January of 2018. So to some degree some of this may be moot, but we still believe that the operative point in time is March of 2016. But I grant Your Honor's hypothetical is, you know, could potentially be relevant. I will also say that did not occur.

THE COURT: Okay. In that case, adding an extra year on won't add to your burden if nothing changed.

MS. CENDALI: Fair enough.

THE COURT: All right, are we ready to go to the second bucket or do you want to tell me more about --

MS. CENDALI: No, so there's three items in the first bucket which is narrowing. The second item

in the narrowing bucket relates to topic 1.B, plaintiff seeks testimony regarding Instagram's obligations pursuant to the terms of its platform policy and, you know, when an API user infringes on somebody's copyright and the actions that it can take, and whether it's ever gone against Mashable and policed Mashable for, I suppose, violating its policies or for copyright infringement or anything like that. And we believe that this is overbroad with regard to us, and probably overbroad with regard to the case to begin with.

First off, this certainly isn't a case about Instagram's obligations, we're not a party, we don't have an obligation to do anything. Second, this is a case about a particular photograph, so asking us to have to prepare a witness and investigate whether Mashable, what Mashable has done in other situations is, is overbroad and burdensome to us. Mashable, as we understand it, is a pretty big company and we shouldn't be required to investigate all sorts of other actions that may have taken place with regard to photographs in general. And this is consistent with general principles of copyright law or even between the parties such conduct would normally not be

relevant because you end up with judges such as yourself having to have little mini trials as to, well, what the relevance is of a given use. You know, with one was there a license, an implied license, was something fair use, wasn't it fair use. You know, certainly the parties are free to inquire if they can argue that it's relevant to this case between them about Mashable's overall conduct. It's not for me to have a position on that. But I think that requiring Facebook to talk about whether Mashable has ever violated its policies or we've ever had a dispute with Mashable about it, is overbroad.

THE COURT: And this, this is somehow tucked into 1.B?

MS. CENDALI: It seems --

MS. JOHANNA SCHMITT: Your Honor, I'm sorry to interrupt.

MS. CENDALI: Ms. Schmitt, would you like to clarify?

MS. SCHMITT: If I may, Your Honor. This is also a reaction to the proposal we got on Friday night and discussed yesterday where they revised or added more clarity to certain topics. So while you're looking at the subpoena, it might not jump out at you,

but this is as a result of, like I said, this recent proposal and our discussion of what they're looking for in 1.B and 1.A, et cetera.

THE COURT: All right, so this implicates A and B even though you can't really tell from looking at A and B.

MS. SCHMITT: Correct, Your Honor.

THE COURT: All right. So you've outlined the issue to me which is you don't think you should have to, under the guise of being a nonparty 30(B)(6) deponent, you don't think you should have to provide discovery to plaintiff as to whether Mashable has done other bad things in the past to other copyright plaintiffs or --

MS. CENDALI: That's right. And then the third issue in the bucket --

THE COURT: And there is no agreement on that, right?

MS. CENDALI: Correct, that's right. And so the third issue in this bucket of narrowing, Your Honor, is the, or the primary third issue in this bucket of narrowing is that they explained to us that the topics H, I and J were all intended to be different ways of seeking testimony from Facebook

about whether it was widespread practice among online publishers to embed Instagram photos on their website. And plaintiff said well this is relevant to Mashable's willfulness.

Whether that is relevant to Mashable's willfulness or not, that's really an issue for the parties. But plaintiff was unable to explain to us why she needs Facebook to testify as to what the widespread practice was of publishers to embed photographs. Facebook is not a publisher, it's a platform, and it seems like the better person to ask about that would either be Mashable, itself, which is a publisher, or potentially other publishers, or typically this is the kind of thing that one would deal with the expert witnesses. But to get into, you know, to have Facebook testify as to whether something was a widespread practice or not is not appropriate for a third party. Plus which, Facebook, you know, might know to what extent people embed, but that doesn't, we wouldn't have any knowledge as to why they're embedding or what they're thinking about why they're embedding. I mean they could be embedding, I show from personal experience people could be embedding people's kids' photographs and things like

that. That doesn't indicate whether people had a license or an implied license, or whether something was fair use or not fair use. We're just not a good instrument for even what they want to get at, and that's too burdensome for a nonparty.

THE COURT: Let me ask you about that. What, you must keep some sort of metric, some sort of data as to, maybe as to who embeds what. So I guess sort of the foundational question here, and actually let me take the lens back a moment and say one of the unusual things in my experiences as a magistrate judge about this subpoena is that the plaintiff, plaintiff is going to get one day of seven hours to cover whatever the plaintiff can get through in one day of seven hours of testimony. And plaintiff doesn't have any documents.

First, what would normally happen, it seems to me, in a case like, is the plaintiff would first, if the plaintiff was truly interested, for example, in using a third party like Facebook to develop a topic like, you know, how widespread is the practice of embedding Instagram, public Instagram posts in other people's websites, and they thought maybe Facebook can help us develop this topic before we hire our

expensive expert or whatever it is we're going to do, they would send a document subpoena out first and say, well, you know, what metrics do you have on this, and they'd see what they got and then they'd decide whether it was worth, you know, trying to use part of their one day of seven hours to give testimony on this. But we're arguing in kind of a, sort of a cart before horse fashion, it seems to me, about whether you have to provide testimony on topics where I don't even know if you have any data, do you?

MS. CENDALI: I don't think we have data on where embedding is a widespread practice in the publishing industry. And the other thing is, our overall point is that this should not be relevant to the issues in, to the extent it's relevant in the case, as a nonparty for Your Honor's own reasoning, all we would have would be, you know, potentially the fact, which is not a disputed fact, that people do embed. I mean that's like there's coals in Newcastle, you know, people do embed, I don't think that's a shocking comment that people sometimes embed, but we don't know why they embed or what the circumstances they embed, or what the state of mind is among publishers.

THE COURT: I get that, but do you know who does it and how often, do you have that data?

MS. CENDALI: I am, two points, one, I am not aware that we have that information, but even if we did have that information, our point is that that would go so far beyond the limited nature of this case which is about one photograph with regard to two parties. And would put a tremendous burden on third party Facebook with regard to its entire business operations and embedding of maybe, you know, under their theory, you know, potentially millions or billions of people. And I see no reason, relevance, with regard to Facebook, whether it had such data or not. Because we'd never, to be clear A) we should not be burdened as a third party with regard to this; and B) the only thing we would have, if we had anything, is the unremarkable point that, yes, people do embed, but that doesn't say anything as to whether there was a, in the minds of the publishing industry in March of 2016, it was an accepted practice or not to embed. There could be 100 different reasons why people embed. And the idea of being able to even know who's even a publisher and how you analyze that, that would be a tremendous amount of analysis even if we kept such

information to try to figure out, well who counts as a publisher and what does that mean. And all of that could be obtained through publisher third parties as to what they think or experts, but not through us.

THE COURT: All right. So I take it that this third bucket within bucket one is not agreed to?

MS. CENDALI: That's right. And then, and then we already discussed the date limitation. The only other items in bucket one where the parties, where we're agreeing to give testimony but just not as much testimony as plaintiff would want, is the issue of the scope of testimony concerning communications related to this case. Plaintiff's subpoena seeks testimony about any communications related to this case, that's in 1.F. And we had the meet and confer with them about this and their point is frankly even broader than the language written. It's not just related to this case, meaning related to, you know, Sinclair and Mashable, but related in general to embeds or possibly anything else on this overall topic.

We've agreed to give them testimony with regard to the *Ars Technica* article and the statements that we made with regard to that article. But they

want a whole lot more than that. First, they want testimony between Facebook and Mashable. Well, if there were -- with regard to any communications between Facebook and Mashable. But certainly they can get that first and they should get that first from Mashable, itself, and not from a third party. We asked them are there any communications that you have in mind, you know, and they said, well, you know, there was an email chain that I guess Mashable produced between Instagram and Mashable and we said, okay, well we could talk about that email chain, we're willing to do that. But they want to go beyond that and we think that that's too broad and requires too much burden to us to try and figure out whether there was ever any other communications with Mashable and that they should first find out from Mashable about that topic rather than have to get to a third party.

Similarly, second, plaintiff seeks testimony from Facebook about communications between Facebook and plaintiff. Well certainly plaintiff should know about what it's communications were with Facebook and we shouldn't have to figure out prepping a witness, you know, what communications there ever were with Sinclair. That, again, is burdensome and is not necessary for a third party.

And then, lastly, they want communications with Facebook and the media, and I alluded to that earlier, we're more than happy to testify about the *Ars Technica* article which was about this issue of whether Facebook was granting a sublicense. But they've mentioned, well, you know, what about this *BuzzFeed* article, but the *BuzzFeed* article doesn't deal with the sublicense issue, it's just sort of a general article that talks about Facebook's aim to improve the Instagram service going forward, but it's not relevant to the infringement that occurred in March of 2016. And we should not be pulled into having to, because of this one issue in this case, be talking about things that don't relate to whether we embedded at that time, what Facebook's policies might be with regard to the future or anything like that is overbroad and puts Facebook in, in a frankly more burdensome position than even the parties, themselves.

THE COURT: All right, so that's bucket one, overbroad --

MS. CENDALI: Correct.

THE COURT: Bucket two, please.

MS. CENDALI: Okay. So bucket two are things that we think the Court should respectfully strike

entirely certain topics. And the first topic is 1.E which seeks testimony about the Instagram's API technology or tool. And this is burdensome and not relevant. It's not relevant because the parties don't dispute that Mashable used the Instagram API to embed plaintiff's post. It's, if they have questions about how the defendant used the API to embed the post or where the content resided or didn't reside, they can get that from Mashable. There is no reason to have Facebook to have to, you know, prepare a witness on complicated technical issues that really aren't in dispute in this case. There is no argument that Mashable didn't embed the photograph in question, that's kind of a given, that's what they've been litigating about for a long time. There shouldn't be a burden on Facebook to dive into its technology on an issue that's admitted and that they could get from Mashable, itself, as to what Mashable did technically in order to display the photograph that Mashable --

THE COURT: Let's be practical here, is this issue a stalking horse for the so-called server issue which has not been decided by the Second Circuit?

MS. CENDALI: I don't think so, Your Honor, although if it has been that would be another reason

for this. But it's really just a pragmatic issue in the sense of why should we have to, you know, talk to engineers and have someone talk about how the, you know, how Facebook's technology works when there is no dispute in this case, I mean we've all been talking about the issues, about how Mashable embedded this photograph. And there's been extensive briefs about what embedding a photograph means. There's no legal issue about what it means to embed a photograph. They may have a disagreement as to whether it's copyright infringement or not or what the scope of it is in damages, but you don't need to have a Facebook person explain that technology. The parties have already admitted how it works and what they did. Mashable certainly, Mashable's engineers knows what they did, Mashable can say, well, you know, we wrote code that did this or we connected it to that. Mashable can talk about what it did, it doesn't need Facebook to have to talk about its technology, and we think that's overbroad and should be stricken.

THE COURT: All right.

MS. CENDALI: Then the other issue is topic 1.L and this is another one that we believe in the second bucket should be stricken. This seeks testimony

about data collected by Instagram when a user's photo or video is embedded. And in the meet and confer yesterday plaintiff agreed to limit this topic to how many times Mashable used Instagram's API to embed plaintiff's works.

Now to be clear --

THE COURT: To embed plaintiff's work or to embed anyone's work?

MS. CENDALI: Well to embed plaintiff's works which, by definition, are beyond the photograph at issue in this case. This is about a particular instance. And we're concerned about, you know, as a nonparty, Facebook having to, being used to get into discovery about other potential infringements that Mashable may have engaged in, if any, using the embedding tool --

THE COURT: Just to, you know, sort of put that out there on the record, once Facebook publicly stated through I guess the *Ars Technica* article that, in fact, all these folks didn't have sublicense, at least not through the Instagram/Facebook, my guess is that Ms. Sinclair's lawsuit is not the only lawsuit premised on a similar set of factual allegations. And what you're concerned about is in dozens or hundreds

or thousands of cases plaintiff's lawyer's first port of call is going to be a 30(B)(6) subpoena to Facebook and that you're going to have to end up doing all the discovery work for all these plaintiffs in all these cases.

MS. CENDALI: I haven't fully thought of it in the way Your Honor articulated it but, yes, that's our overall premise of all of this. Which is the parties should be able to sort this out. Mashable should know what it did. They could investigate about Mashable. I mean Your Honor may have to decide whether it's relevant to this case about this photograph, whether you're going to permit discovery about other photographs that Mashable may have embedded of the plaintiff, that's not for me to say.

THE COURT: The premise of the conversation that we're having now is that you do have this data. You have some dataset somewhere that's going to tell you whether, if I deem it relevant and producible, you have some dataset somewhere that's going to tell you how many times Mashable used the Instagram API to embed one of the photographs, one of plaintiff's posts, right?

MS. CENDALI: That's the premise of the

question which we believe is, as I say, is not relevant and too burdensome for a nonparty. And to be clear --

THE COURT: How can I tell whether it's too burdensome if you won't tell me what you've got?

MS. CENDALI: Well there's two points, Your Honor. One, it's not relevant. This case is about one photograph. So for them to ask for, by definition their request is to have Facebook tell them about any other time that Mashable has done this. Our position is they should get that from Mashable and Facebook should not be, have to look for that information.

THE COURT: All right, look --

MS. CENDALI: Secondly, I can tell the Court --

THE COURT: Counsel --

MS. CENDALI: (Continuing) -- we don't know to what extent it would even be possible for Facebook to be able to, my experience with Facebook and with major software applications like that is that it's not like, you know, pushing a button. You know, normally someone would have to write code to do a report to try to pull out and extract information. In other words, there'd be no reason, and I have no reason to believe

that Facebook has, you know, this is the Mashable file about Mashable's embeds or anything like that.

THE COURT: So counsel, what you're telling me is I don't know, Your Honor. I don't know what we've got and I don't know how hard it would be for us to pull it out.

MS. CENDALI: What I'm saying is that --

THE COURT: I'm pushing you on this point and I'll just say it now because it's going to come up when I talk to plaintiff's counsel, as well. Relevance is not black and white, it's not either/or. There is a sliding scale of relevance. Some things are more relevant than other things. Burden is not either/or. Something are a little bit burdensome, some things are a lot burdensome. Both relevance and burden go into the proportionality calculation that I now have to explicitly make under Rule 26(E)(2), along with some other things, those are not the only categories.

Generally speaking, the plaintiff has the burden of persuasion on relevance. Generally speaking, the defendant, or the party, in this case the party resisting discovery or the nonparty resisting discovery, has the burden not just of

persuasion but of proof on burden. So for you to say to me, Judge Moses, this is totally irrelevant, that's fine. But you need to, but if your backstop is going to be and it's too burdensome, you need to actually give me some facts there.

MS. CENDALI: Okay. And what I can tell you, Your Honor, because this I know to be true, is that this isn't like do you have a, you know, a pile of documents sitting in a file you could easily produce. There would have to be a complicated program written to try to extract information specifically with regard to Mashable's embeds. And that is a big burden and that is the case. And that would be a big burden for a third party to have to have when there is a party, Mashable, that could be asked about its, what it has done in the past with regards to other embeds, if any, of Sinclair's photograph.

THE COURT: Again, I should say it now because it's going to keep coming up, with regard to the, you keep making the point that plaintiffs should get all of this information through party discovery first before they come and burden you.

MS. CENDALI: Correct.

THE COURT: There are some cases in some

jurisdictions that say that. That is not currently the law in the second circuit and it hasn't been for some time if it ever was, I'm not sure if it ever was. Which is not to say that there isn't some heightened sensitivity to the problems of third parties who didn't ask to be part of this in the first place. There is heightened sensitivity, both on the relevance front, there are some cases, including one that you cited that I wrote myself, which says that we have to look hard at relevance in the case of a nonparty because they didn't ask to be part of this. And there are plenty of cases in our circuit and others that say you have to be particularly sensitive to the burden issue on the part of a nonparty because it's kind of, it's less fair to make a nonparty bear all of this expense and burden than it might be to make a party shoulder those same weight.

But, again, it's not black and white. There is no rule that says you have to exhaust all of your party opportunities before you start seeking otherwise relevant and discoverable information from nonparties. So, you know, my mental landscape here involves a multidimensional sliding scale model where I have to consider burden, I have to consider relevance, I have to consider cost. I have to consider party sources

from whom this information could or should more conveniently be obtained and so forth. And I have to sort of keep all those balls in the air at one time, there is no one issue which is typically going to be dispositive as to any one category or subcategory.

MS. CENDALI: Thank you for shedding light, that makes sense as to, you know, how Your Honor is approaching it. But I believe that certainly with regard to relevance, I know that's just part of it, but if the lawsuit is about one photograph, it's sort of, normally if I'm representing a party in this, either party, it's normally copyright 101 that the lawsuit would be just about that one infringement and not about lots of other infringements. So that's --

THE COURT: And the plaintiff would be saying, no, I need to know about all of these other infringements because it goes to willfulness and/or it goes to damages. And then the defendant --

MS. CENDALI: Well, but the point is they should be able, and I understand what Your Honor is saying about, well, there's lots of different sliding scales and, you know, what to do, I take that. But it seems like they should --

THE COURT: Ms. Cendali, it would be better

for you not to interrupt me in the middle of a sentence.

MS. CENDALI: Forgive me, Your Honor, I didn't realize that you were speaking.

THE COURT: I see. Are there any other subtopics in bucket two?

MS. CENDALI: The only other, I think we were just discussing the idea of, of the topic two bucket which is communications kind of related to this case. And from our point of view, even if we were a party asking for any communications related to this case --

THE COURT: Ms. Cendali, that was part of bucket one.

MS. CENDALI: Oh, forgive me, Your Honor. Forgive me, the last topic, forgive me, Your Honor, yes, there's two more topics.

THE COURT: What you have in bucket two so far is the technology issue tied to topic 1.E, and the issue we were just most recently discussing tied to topic 1.L which is information and data that Facebook may or may not have and may or may not be able to pull out of its systems with regard to Mashable's use of the Instagram API to embed plaintiff's post.

MS. CENDALI: Yes, Your Honor, and forgive me,

I turned to the wrong page in my notes and I apologize. The other two remaining topics with regard to this is topic 1.M, which seeks testimony about what Facebook is planning or intending to do regarding Instagram user's control of their data. And, you know, for the threshold matter Facebook's future plans are obviously highly proprietary, but they're also irrelevant to what happened in 2016 or even through January of '18. And we think that's too, too burdensome to ask and not relevant to ask a nonparty for their future plans.

THE COURT: Right.

MS. CENDALI: And then the last topic is 1.N which seeks testimony about Davis Wright Tremaine, which I understand, maybe not today but, in general, is defendant's counsel in this case. And they want to know about Davis Wright's representation of Facebook in other matters. At the proposal, the meet and confer yesterday, plaintiff agreed to narrow this topic to whether Davis Wright drafted the Instagram terms of use and platform policy, but it's not clear whether they did or didn't, whether why that would be relevant to the issues in this case.

We asked plaintiff that and plaintiff said,

well, that could help, they might want to see whether Davis Wright then had a conflict of interest. But if Davis Wright had a conflict of interest, it would be Facebook's right or not to waive or assert the conflicts. Sinclair wouldn't have the right, you know, Davis Wright, as I understand it, has never represented Sinclair. So Sinclair can't assert a conflict that Facebook would have to disqualify anyone, and we think this is not relevant and burdensome in that it gets to who Facebook hires and for what purposes and intrudes on the attorney-client relationship and the ability for lawyers to represent many different companies for many different things.

THE COURT: All right --

MS. CENDALI: So that's the second bucket.

THE COURT: And then there is a third bucket which is the document requests?

MS. CENDALI: Correct, Your Honor. Facebook has already produced documents. It's produced its terms of use and platform follow-up, you can see that it was effective of March of 2016. It's also produced the correspondence, not just the article with *Ars Technica* but the correspondence leading up to that June 4, 2020, article. But their document request is

just an overbroad catchall. It just, it doesn't comply with Federal Rules of Civil Procedure 34(B)(1)(a) because it doesn't describe with reasonable particularity each item or category of items to be inspected or produced. It just asks for any non-privilege relevant documents or information that might substantiate or support deponent's testimony in any way. Well we don't even know what the, leaving aside we don't know what the deponent is going to say, but that's a, that's like in a document request, you know, please give me all documents relevant to the case or relevant to the other side's position in the case. I mean that's just too hard for even a party to have to figure out, let alone a nonparty. And our overall position though, Your Honor, is that, you know, Facebook's role in this, while important with regard to the sublicense issue, is narrow with regard to that issue. And we're willing to give testimony on that and to also, you know, the communications with *Ars Technica* about that sublicense point.

Other documents with regard to Facebook do not seem to be needed to make any point in this case. And we respectfully submit that Facebook should not be burdened to produce any additional documents.

THE COURT: Thank you. Whose motion is this for the plaintiff?

MR. BARTOLOMEI: Pardon me, Your Honor, what was the question?

THE COURT: Whose motion is this, which lawyer, which plaintiff's lawyer is arguing this motion?

MR. BARTOLOMEI: Oh, I'm sorry, James Bartolomei, Your Honor.

THE COURT: Okay, so Mr. Bartolomei, before we get into the details, either organized by bucket as Ms. Cendali has done, or perhaps you want to take a different approach, let me ask you a big picture issue. One thing Ms. Cendali seems to me clearly right about is that your, the duces tecum portion of your subpoena, please produce all relevant (indiscernible) the witness's testimony, is fully unenforceable. There is no way I'm going to require Facebook to produce documents beyond what they've already produced in response to that wholly inadequate document demand. Which leads to sort of the bigger picture question which I previewed to Ms. Cendali, which is why are you doing it this way? You're going to get one day of seven hours. If you don't get to

focus in on the questions you really want to ask and get answers because you don't have the documents, you're going to be stuck. You can't go back for a second and a third trip to the well. Why are you doing it this way?

MR. BARTOLOMEI: So I appreciate that different lawyers practice different ways but we're all bound by the Rules of Civil Procedure. Invariably, each topic which Ms. Cendali, unfortunately, was not on the call yesterday but two of her colleagues at Kirkland were, I believe we made significant headway to narrow those topics.

So in the interest of knowing that there is a discovery cutoff in this case, it sounds, if I were to use the term reading Your Honor's tea leaves, that it would make sense for us to propound some limited document requests for documents to be produced in advance of a deposition. And invariably, I believe we should be able to move pretty quickly through these topics in terms of plaintiff's response, which also means that I believe the universe of documents is probably relatively small. I believe Facebook has already produced three documents in this case and I can't imagine that we're interested in having Facebook

go out and, you know, create special code, you know, for this case. That would be unduly burdensome. But as a sort of procedural matter, because the holidays are upon us and we had a discussion bout timing yesterday, it would probably make sense for us, in a short period of time for Mr. Hoben and myself to propound some very limited document requests so we have those so we don't have to come back to the Court. And a deposition is, I don't think it's going to take seven hours, you know, to go through a 30(B)(6), I think it will be a fraction of that. But with that in mind, I think we can get one out within a week and try to get this thing scheduled sometime in, you know, in January.

THE COURT: That's just going to kick the can down the road and we're going to be back here fighting about the same thing. So, you know, what documents I might, assuming that you get your act together procedurally and you actually send a subpoena which identifies the documents with reasonable particularity, which is, indeed, what the Federal Rules require, we're still going to be back here arguing about what's relevant and what's burdensome, aren't we, unless we have some clear ideas coming out of today's conference what the boundaries are there.

MR. BARTOLOMEI: I think we can get, after we go through those topics, I think we've made great pains, especially given, having gone through a conference on Mashable a few weeks earlier, that it made sense to try to narrow those. And I think we've, you know, I think we've come up with, and the Court does not have the benefit of very specific areas for each of these topics that are in no way unduly burdensome to, you know, to Facebook. I think most of them were probably, you know, require very little preparation.

Part of the issue, Your Honor, the foundational matter is, as the Court recognizes, it's plaintiff's burden of proof. And I've got some holes in evidence that nobody besides Facebook has access or is in the best position to provide that proof in this case. So, you know, I think that may be helpful in terms of the document issue.

THE COURT: Well, perhaps but, you know, it's good to hear you say that you think this is going to be an efficient deposition. That you think you can get through it quickly. That you have some specific and concrete, you didn't use that word, I used that word, you had some specific questions that you needed

to ask Facebook that you can't get from party sources. That's fine. The problem is, from my standpoint and from Facebook's standpoint, and from the standpoint of Rule 30(B)(6), is that Facebook has to go and I have to go by the face of the 30(B)(6) subpoena and the topic list appended to it insofar as I don't narrow it, in terms of what the scope of the deposition is going to be. And Facebook's burden is a burden of prep.

So in the case of a party deposition, we don't have this problem. In the case of a party deposition, you send out your deposition notice, you don't have to, you don't have to specify the topics. The witness doesn't have to prep. The witness just shows up and decisions have to be made on a question by question basis as we go as to whether these questions are, in fact, you know, in the proper scope of relevance. And that's all fine.

But with a 30(B)(6) who is a nonparty, with a nonparty such as Facebook, the calculation really is different. Because they're not here by choice. They're not the plaintiff. And they don't have to be here anyway for other reasons because they're not the defendant. So you are reaching out to them to, as you

put it, plug in some holes that you can't plug otherwise. But they have an affirmative obligation under Rule 30(B)(6), if you send them a list of topics and I don't narrow it or the parties don't agree to narrow it, they have to find one, or two, or three, or seven witnesses and spend one, or two, or three, or seven days making sure that that witness is prepped about those topics.

So you owe it to them, if your topics really are narrow and really aren't going to be burdensome, you need to be able to articulate that or I'm going to have to do it for you in the form of an order, so that they know what they do and don't have to prep people on. In the face of your subpoena looking at it now, it doesn't do that job.

MR. BARTOLOMEI: I don't disagree with that general proposition, that's why I think going through each of the buckets or topics and putting on the record, and Facebook has in their possession as of Friday last week a significantly tailored, even though they're objecting and making general objections about undue burden, I think we've narrowed it to the point where we still have a case to go prove and Facebook has the proof that we can't get really from anywhere else.

THE COURT: So do you want to walk through the buckets with me or do you want to approach it in some other way?

MR. BARTOLOMEI: No, I think that's the best way to do it, is to go through those buckets and respond accordingly.

THE COURT: All right, go ahead.

MR. BARTOLOMEI: So as to the overbroad area for topic 1.A, the reason why we're going back to 2012, this is a very narrow issue, is whether Facebook likes it or not, this is, they're really an indispensable entity in this mix. This isn't just a single, you know, simple infringement, you know, case. We've got plaintiff, who has come onto the platform, we want to generally be able to ask questions and elicit testimony as to what exactly she was, you know, agreeing to when she came onto the platform. You know, what rights did she, you know, retain. And it could be as simple as one question. You know, Facebook, did Ms. Sinclair retained her copyright, if she had one, in this photograph? You know, there may be some follow-up to that, but generally that's what we want to know.

To remind the Court, we were at the motion to

dismiss level because we didn't have the benefit of discovery, and clearly you've got Mashable and plaintiff disagreeing about what those terms say. We, from my perspective, plaintiff has an uphill battle to overcome the notion, right or wrong, that Instagram didn't do a very good job to writing these terms because the whole world under this legal fiction was operating under the premise that it was okay to embed photos using the API and you didn't need to go out and get consent, or you didn't need to have a defense, you could just go do it because the terms said so.

Well I think from day one when these terms were written by Instagram, it's been their position that they remained consistent in that regard of (indiscernible) retained. So really to boil this down from a layperson's perspective, if God forbid we get in front of a jury on this, that that foundation is laid. Like this is what plaintiff owned when she decided to use the Instagram platform.

So topic 1.A is very narrow as to that general area of what she retained when she assented, when she agreed to be bound by Instagram.

THE COURT: Counsel, counsel, Mr. Bartolomei, you're talking about 1.A?

MR. BARTOLOMEI: Correct?

THE COURT: On its face it says terms of use (indiscernible), have you just spent the last five minutes arguing about why you should go back to 2012 on this one? I'm confused.

MR. BARTOLOMEI: We met and conferred yesterday with Facebook's counsel and we discussed the reason why we wanted to know, if it's in Facebook's possession, the proof that she actually agreed to those terms. It could be as simple as, yes, we have the date that she signed up, we have the date, I mean if they don't have it, they don't have it. I don't know how --

THE COURT: Mr. Bartolomei, I am a simple country magistrate judge, I start with your 30(B)(6) subpoena, where have you asked for that information?

MR. BARTOLOMEI: Your Honor, it's in the one that we noticed and sent, in the notice on Friday. So, again, I prefaced that with you don't have the benefit of that in front of you.

THE COURT: You're arguing, you are arguing to me a subpoena I haven't seen?

MR. BARTOLOMEI: I'm referencing a conversation that Ms. Cendali referenced multiple

times when she was breaking these buckets up and Ms. Schmitt also raised.

THE COURT: Did you serve an amended Rule 30(B)(6) subpoena?

MR. BARTOLOMEI: Yes.

THE COURT: You served an amended --

MS. CENDALI: That's not --

THE COURT: Hold on. Hold on. Hold on, one at a time. Mr. Bartolomei, you are plaintiff's counsel of record and an officer of the Court, did plaintiff serve an amended Rule 30(B)(6) subpoena on Facebook last Friday?

MR. BARTOLOMEI: All counsel were sent it via email.

THE COURT: What are we doing here today? When were you, when were you planning to tell me that the motion I have that I've now prepared for twice because we (indiscernible) and ran out of time last time, is now moot?

MR. BARTOLOMEI: We started the conversation off today in this hearing that some topics had been narrowed. Ms. Cendali did not --

THE COURT: There's a huge difference between some topics have been narrowed, which means I start by

looking at the subpoena (indiscernible) and think about whether it has been narrowed, and telling me, oh, never mind, Judge, we have a whole new one which is better and more specific and will stand up to your scrutiny, except we haven't showed it to you.

MR. BARTOLOMEI: After meeting and conferring with Facebook's counsel yesterday, both parties agreed that we would not send it. And, unfortunately, I understand why now, because you're looking at a very general one --

THE COURT: That you would not send it?

MR. BARTOLOMEI: Yes. And counsel -- yes, counsel --

THE COURT: Yes or no, counsel, this is not a hard question, has the subpoena that I'm looking at been superseded by a new one?

MR. BARTOLOMEI: It's plaintiff's position that it has, yes.

MS. SCHMITT: Your Honor, this is Johanna Schmitt --

THE COURT: No, wait. Wait.

MS. SCHMITT: Sorry.

THE COURT: Wait, please. You sent it to them by email, is that correct, Mr. Bartolomei?

MR. BARTOLOMEI: That's correct.

THE COURT: When did you do that?

MR. BARTOLOMEI: Friday, last week.

THE COURT: And is there an agreement in place among counsel for plaintiff, counsel for defendant and counsel among Facebook to accept service of subpoenas by email?

MR. BARTOLOMEI: They responded accordingly, and they represented that, yes, we would work cooperatively together to set the deposition and accept items via email. I mean do I have to reserve Facebook at their headquarters, no, they've agreed to accept all correspondence on behalf of Facebook at this stage.

THE COURT: All right. Defendant, we haven't heard from you and we've been going around on this for a while now, who's motion is this for Mashable?

MS. WOLFF: Yes, good morning, Your Honor, this is Nancy Wolff from Cowan, DeBaets, Abrahams & Sheppard. We are not part of this motion.

THE COURT: I understand, I just want to touch all the bases. Do you agree that there has been an amended or superseding subpoena and that's what we've been talking about, not the one that we've been

talking about these last 45 minutes?

MS. WOLFF: I was part of the conversation we had yesterday when there was a meet and confer, and I do know an additional subpoena was sent on the part of plaintiff. I believe that is what we are now based on.

THE COURT: Thank you. Ms. Cendali, is there a new subpoena?

MS. CENDALI: No, Your Honor, they did not serve a new subpoena. They served at 8:00, they sent us by email and all counsel, something called an amended notice for deposition and duces tecum to Facebook, Inc. We did not agree to accept service of a new subpoena, nor did the discussion about it treat it as a new subpoena. It was treated as part of the meet and confer process to try to narrow the existing subpoena.

THE COURT: An amended notice of deposition, not a subpoena at all?

MS. CENDALI: I'm reading what it says, amended notice for deposition and duces tecum to Facebook.

MR. BARTOLOMEI: It's pursuant to subpoena, Your Honor. If she keeps reading, it says, "This notice is pursuant to the subpoena that was already served on September the 10th. These same lawyers have

agreed to accept all correspondence, I don't know that I've got to re-serve, I mean Facebook's headquarters.

THE COURT: Be quiet, please, all of you. Let's do a little Civil Procedure 101 here. The way a party (indiscernible) testimony and/or documents to a nonparty is a two-part (indiscernible). There is a document called a subpoena which is governed by Rule 45, which you have to serve on the nonparty. And which in the case of a 30(B)(6), has to contain, appended to it, a list of the topics that you want testimony on. And in the case of a duces tecum, has to contain, appended to the subpoena, a list of the documents that abide with reasonable particularity that you want the third party to produce.

If there is going to be testimony at a deposition, you also have to separately serve under Rule 30, a deposition notice, which sets out the time and the place and so forth. And that has to go to all the parties in the case. And certainly the better practice, although I don't remember off the top of my head if the rules are written this way at the moment, they keep switching back and forth, but certainly the better practices is that you do all of those things simultaneously and you make sure that both the party,

the parties and the nonparties have a copy of both the notice and the subpoena.

I'm not sure where we are in that process, but what I have clearly heard in the last few minutes, is that the plaintiff is not really standing on the subpoena that I have in front of me. The plaintiff agrees that the topics can be, should be, most be more specific and more precise. And I just heard the plaintiff agree that it would be a really good thing to actually ask for some documents specifically and, if possible, try to get them in hand before the deposition happens. All of that is fine, it's just that you really don't want your magistrate judge to be the last person to find this stuff out halfway through a discovery hearing. You need to tell me what's going on.

MS. CENDALI: Your Honor, this is Ms. Cendali. To be clear, a subpoena looks like a subpoena, right, it has a subpoena coversheet and it says it's a subpoena. This does not do that. And, in fact, as the second line that plaintiff indicated states, "Please take notice that plaintiff issues an amended notice of deposition that is pursuant to the subpoena, duces tecum, that was served on Facebook on September

10, 2020." In other words, looking at this piece of paper, it only referred to the subpoena, the original subpoena that we've been talking about of September 10, and we interpreted this and had a meet and confer with them, as an attempt to narrow the issues with regard to their only subpoena that they served. They didn't say we're going to strike and replace that subpoena, forget that subpoena, here's a new subpoena, there's been no new, there is no new subpoena and the document doesn't, by its terms, refer it as being a new subpoena, it only refers to the September 10 subpoena. That's what we thought and that's what the discussion yesterday was about, which was narrowing the issues with regard to the original subpoena which is the only one that exists.

So, you know --

THE COURT: This new notice, whatever the heck that is, this new notice which was sent around by email contains a different and narrower list of topics?

MS. CENDALI: It contains a different, in some instances a narrower issue, a narrower list of topics. And that is what we were talking about during my portion of the argument. I was explaining the points

where we had reached agreement and on the points where we remained at an impasse and the new document that they served did not change any of the things that I was arguing.

THE COURT: Except, Ms. Cendali, the point you neglected to mention to me was that all of this was in a document which I had never seen.

MS. CENDALI: I did say, Your Honor, that they served a new document that attempted to narrow the issues and that we had a meet and confer about it yesterday, but we don't think that the document is an operative subpoena.

THE COURT: All right, there are two ways we can handle this today, ways I'm prepared to handle this today. I can give you a ruling on the subpoena which is before me, the operative subpoena. I can give you a ruling which will disallow the duces tecum portions of it for the reasons that I previously explained and which will tell you which of the topics listed in Exhibit 1, not the topics listed in some other document that I haven't seen, but what portions of the topics listed in Exhibit 1 of the subpoena that I have seen I deem to be sufficiently relevant and proportional, and none burdensome and non-privileged

to permit the deposition to go forward on. And then you can take the deposition, Mr. Bartolomei, and that's it, you're done taking the deposition from Facebook.

If you want to start all over again in the way that you just suggested to me, if you want to withdraw the current subpoena and note a new one, maybe send it out in two pieces, first the duces tecum and then a deposition subpoena, you can do that, too, but you can't do both. What do you want to do?

MR. BARTOLOMEI: Your Honor, I think it would make more sense to go with option two. And to the extent that we need to revisit any meet and confer items, I'm happy to do that with Facebook's counsel. But I don't want to be in a position where the Court is operating on what's clearly a subpoena, or excuse me, topics that are way too broad. Plaintiff acknowledges that and apologizes for the confusion. It makes more sense to go with option two and send it out in two pieces with the topics that are much more narrowed and we're happy to allow the Court to make a ruling, you know, based on that, given the context of what you've already heard for the last hour and a half.

THE COURT: All right. So Mr. Bartolomei, as counsel for plaintiff Sinclair in this case, are you withdrawing the subpoena which is before me without prejudice to reserving a subpoena to Facebook?

MR. BARTOLOMEI: Yes, Your Honor.

THE COURT: Thank you very much. That will conclude the formal portion of today's discovery conference. For the guidance of counsel, I don't usually do this, but I don't want you to have to read the tea leaves based solely on my conversation with one side, having not had a conversation with the other side yet, for the guidance of counsel, my inclination here which, of course, is nothing but an inclination not having seen the new subpoena and not having been presented with what other facts and argument the parties may need to present to me at some time in the future if they can't work this out, my inclination is to limit the temporal scope of the Facebook subpoena to March, 2016, through January of 2018.

My inclination is also to limit the topics with respect to the terms of use and the platform policy to those which can fairly be discerned from the complaint, including the provisions set forth in paragraph 35 of the operative complaint. To the

extent that plaintiff wishes to use Facebook to explore issues of willfulness and/or damages, that is to the extent that plaintiff wishes to use Facebook to explore questions such as what are other publishing companies doing with respect to using the API to embed Instagram posts, or what has Mashable done with respect to plaintiffs other than Ms. Sinclair, I am unlikely to permit Facebook to be your first stop there, plaintiff. Given that they are a nonparty and did not ask to be here and are not accused of any wrongdoing, it does seem to me that from a proportionality and a burden standpoint, you are going to have to make at least some effort to get that information elsewhere before you make Facebook your workhorse with respect to those issues which do not relate directly to the photograph which is at issue in this case and the period of time that it was embedded on Mashable through the Facebook API.

With respect to communications regarding this case, I am not, I don't think it is outrageous for you to want to know about Facebook's non-privileged communications concerning this case with both the media and the parties to this case. But I am very concerned about how we distinguish those communications

from communications which are going to be privileged. Generally speaking, when you ask a question, ask for documents or ask for a deposition category which includes both privileged and non-privileged items, the party from whom the discovery is sought, or in this case the nonparty from this discovery is sought has an obligation to catalog for you, to log all of the items of information or the documents that are being withheld on privilege grounds.

If the request is too broadly construed that, in and of itself, becomes a huge and unreasonable burden. And I don't want us to be going down that path there. So if you are going to be asking for communications about a lawsuit, I want you to be very sensitive, plaintiffs, making sure that you define the question, that you ask the question in such a way that you are not intruding into privileged areas.

Are there any other issues where the parties think that some guidance might be helpful before you finalize and serve your second subpoena?

MS. WOLFF: Your Honor, this is Nancy Wolff on behalf of Mashable. I am not speaking about guidance at all, and it's a very minor point, but I just wanted to clarify that in plaintiff's letter to the Court he

said that I made a statement in an article regarding *BuzzFeed*, but I think there was some Nancy confusion. The article quoted a Nancy (indiscernible) from *BuzzFeed*. So very small point, but I just wanted you to know that I didn't make a statement about this case in --

THE COURT: Noted. But you reminded me of one other tail wagging dog type of question which might perhaps be helpful to touch on now. There's no disqualification motion pending with respect to Davis Wright Tremaine, correct?

MS. WOLFF: Correct.

THE COURT: Correct. It is going to be difficult to persuade me that at this stage of the case, with the issues being what they are now, that it would a legitimate use of the Rule 30(B)(6) device and the Rule 45 subpoena device to drag Facebook into the question of what a certain law firm did or did not do for it. So that's going to be a very steep uphill battle, Mr. Bartolomei, if you --

MR. BARTOLOMEI: In retrospect, I think we can withdraw that topic.

THE COURT: All right. So the ruling for today will not really be a ruling at all, it will

simply be a notation that the protective order motion is denied as moot, the subpoena having been withdrawn without prejudice to service of a new subpoena?

Anything else?

MR. BARTOLOMEI: Your Honor, James Bartolomei for the plaintiff again. One additional question. As to the indication of the temporal range or time range, one of the areas that we do believe is relevant and is proportional is that Instagram advertised or provided some sort of training manual how to, whatever that magic word is, on how to use the API. And that would have occurred prior to when this post occurred. Because there's a fight in this case, or there's an issue at stake regarding, you know, what the API and its use actually meant to the various parties, both plaintiff and Mashable. We do think it's fair game to be able to inquire, and Facebook would probably be in the best position to cover that topic of how they rolled out the use of the API and introduced it to publishers such as Mashable. And there may not be any document at all, but I do want to at least raise that as something that is certainly important as it attests to the willfulness issue.

THE COURT: Well, practice tip here.

Generally speaking, when I limit, when I limit a subpoena to a certain temporal timespan on relevance grounds, I understand in the real world that that the question, certainly from a document perspective, the question isn't what documents were written during the relevant time period or were emailed during the relevant time period, or were edited during the relevant time period, those are included for sure, but it's what documents were applicable, what policies were in existence, what terms of used governed, et cetera, the relevant time period.

Now if those terms of use were prepared a year earlier but they were the operative terms of use during the relevant time period, then obviously you can get them in the subpoena duces tecum, and you can talk about them during a deposition because they were the operative documents during the relevant time period. So if this, if this thing exists, some kind of an instruction manual for how to use the API and if the instruction manual, itself, predates the beginning of what I think is likely to be the relevant time period here, which is March, 2016, but if it's what everybody still had, if it was still operative come March, 2016, you, you know, ask for it, see what you

get.

MR. BARTOLOMEI: Fair enough, I appreciate that, and apologize for what we've been through today. This was working with Facebook to try to narrow this and it did not accomplish what our intent was, or at least what my intent was.

THE COURT: I think a fresh start is best here. What's your deposition deadline, excuse me, your discovery cutoff?

MR. BARTOLOMEI: It's either the 2th or 28th of January, end of next month.

THE COURT: Right, well don't waste time.

MR. BARTOLOMEI: Oh, no, we're on it. We appreciate the Court's time today. Thank you.

THE COURT: All right. Thank you very much, ladies and gentlemen, we'll be adjourned.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Sinclair versus Ziff Davis, LLC, Mashable, Docket #18cv790, was prepared using PC-based transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 4, 2020